90-1050

(1)

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

MICHAEL J. FRIEDMAN,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether, under Fed. R. Crim. P. 12, a defendant's claim that his federal indictment must be dismissed because it was returned by a grand jury whose members made overt, racist, "us"-against-"them" remarks during the grand jury proceedings, and whose supervising prosecutors did nothing to counter the expression of racism and may have joined in it, is waived -- and no relief from waiver is available -- where the defense counsel first learned of the racial remarks while reviewing Jencks Act material produced immediately before trial, and brought the matter to the district court's attention before the trial started, but filed the formal motion to dismiss a few days after trial had begun.

II. Whether grand jury discrimination in

the federal courthouse by black grand jurors against a white accused can be treated differently than grand jury discrimination by white grand jurors against black accuseds or whether a federal indictment is per se void, regardless of whether the discrimination is by whites against blacks or by blacks against whites, where overt racist remarks were made by the grand jurors in the course of their official proceedings, and the prosecutors did nothing to counter, or affirmatively joined in, the expression of race hatred.

III. Whether the Court of Appeals' conclusion that the issue whether a Veterans Administration fee appraiser is a public official for purposes of the bribery statute, 18 U.S.C. §201(a), is an issue of law

to be decided by the court violates Petitioner's rights under the Fifth and Sixth Amendments to have each essential element of a criminal offense decided by a jury.

PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

The parties in the court below were Michael J. Friedman, Steven F. Madeoy, and Jakey Madeoy, all defendants-appellants, and the United States of America, appellee.

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The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 912 F.2d 1486, and is set forth in the appendix at A-1. The district court's memorandum order of July 17, 1987 is not reported; it is reproduced in the appendix at A-20.

JURISDICTION OF THIS COURT

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on August 10, 1990. (A-27) The petition for rehearing was denied by order entered on October 16, 1990. (A-29) This Court has jurisdiction to review the judgment of the Court of Appeals for the District of Columbia Circuit pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the Constitution provides, in pertinent part:

> . . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law . . . .

Rule 12 of the Federal Rules of Criminal Procedure provides, in pertinent part:

> (a) Pleadings and Motions. Pleadings in criminal proceedings shall be the indictment and the information, and the pleas of not guilty, guilty and nolo contendere. All other pleas, and demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.
>
> (b) Pretrial Motions. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:
>
> (1) Defenses and objections based on defects in the institution of the prosecution; or

(2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings); or

(3) Motions to suppress evidence; or

(4) Requests for discovery under Rule 16; or

(5) Requests for a severance of charges or defendants under Rule 14.

(c) Motion Date. Unless otherwise provided by local rule, the court may, at the time of the arraignment or as soon thereafter as practicable, set a time for the making of pretrial motions or requests and, if required, a later date of hearing.

* * *

(e) Ruling on Motion. A motion made before trial shall be determined before trial unless the court, for good cause, orders that it be deferred for determination at the trial of the general issue or until after verdict, but no such determination shall be deferred if a party's right to appeal is adversely affected. Where factual issues are involved in determining a

motion, the court shall state its essential findings on the record.

(f) Effect of Failure To Raise Defenses or Objections. Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (c), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.

* * *

(h) Effect of Determination. If the court grants a motion based on a defect in the institution of the prosecution or in the indictment or information, it may also order that the defendant be continued in custody or that bail be continued for a specified time pending the filing of a new indictment or information. Nothing in this rule shall be deemed to affect the provisions of any Act of Congress relating to periods of limitations.

* * *

STATEMENT OF THE CASE

This is a race case, but hardly a typical one. This is a case where black grand jurors, in a district which is predominantly black, discriminated on the basis of race against a white defendant, right in the federal courthouse and in the presence of federal prosecutors who did nothing to prevent, and indeed themselves encouraged, racial bigotry in the grand jury room. The fundamental question at the heart of this case is whether that racial discrimination will be treated the same as the more common, and equally odious, discrimination which has historically been practiced by whites against blacks in this country.

Petitioner's claim of racial discrimination by the grand jury which indicted him has not been adjudicated. The courts below, twisting Fed. R. Crim. P. 12 and distorting the facts, held that the claim was waived. Petitioner submits that, if he were a

black and had been indicted by white grand jurors who made the kind of racial remarks which were made in this case, the courts would not have used hypertechnical interpretation of the procedural rules to block consideration of his claim. The judges would have done more than shake their fingers and make pious pronouncements. In treating this case differently than the same case with the races reversed, the courts below have done a great disservice to whites and blacks alike. If left undisturbed, the "special" rules fashioned for this atypical case will be invoked by other judges to bar consideration of other claims of racial bias in the grand jury, including those where the discrimination is practiced by white grand jurors against minority accuseds.

* * *

On November 5, 1986, a federal grand jury in the District of Columbia indicted Petitioner Michael J. Friedman, who is an

attorney, and several others. Petitioner Friedman and his co-defendants are white. The grand jury which returned the indictment against them was black.

The indictment alleged a scheme to defraud the United States Department of Urban Development's (HUD) Federal Housing Administration (FHA). (A-2)[1] Fraud in HUD's programs and operations -- including the alleged fraud which was the subject of this indictment -- have been blamed for a variety of ills in this nation's urban areas. According to recent front page stories in The Washington Post, fraud in HUD's loan insurance program destabilized established, lower middle class black neighborhoods, undermined rent control, displaced longtime renters, and left buildings abandoned, easy targets for

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[1]The alleged scheme involved fraud in procuring FHA insured mortgage loans for two-unit and four-unit rental properties in the District of Columbia.

takeovers by drug traffickers.[2] Thus, while the ostensible victim of the alleged fraud was the government, in the view of some, the ultimate victims were members of Washington's black community.

As the record they left behind reveals, the grand jurors saw the case -- and the defendants -- in racial terms. Their comments, recorded in the grand jury transcripts, reflected their view that this was an all-too-typical instance of whites ripping off blacks -- and using blacks to do

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[2] See K. Downey, "The Real Price of Housing Fraud: As Speculators Turned Quick Profits, Longtime Tenants Lost Their Homes," The Washington Post, Sept. 2, 1990, p. 1, col. 1; K. Downey, "Anatomy of a Real Estate Scheme: Dealers Illegally Obtained Government-Backed Loans, Evaded D.C. Rent Control Law," The Washington Post, Sept. 2, 1990, p. A-15, col. 1; K. Downey, "FHA Fund Threatened By Widespread Fraud: Inflated Appraisals Skewed Taxes For Many District Property Owners," The Washington Post, p. A-15, col. 5; K. Downey, "The Euphoria of Easy Money: Many Drawn Into Fraud," The Washington Post, Sept. 3, 1990, p. A-2, col. 1; K. Downey, "Following The Twisting Trial of Fraud," The Washington Post, Sept. 4, 1990, p. A-1, col. 2.

it. Those transcripts also show that the prosecutors did nothing to discourage, and even joined in, the grand jurors' expressions of racial bias. Petitioner did not learn what had transpired in the grand jury room until his trial was about to commence.

Petitioner entered a plea of not guilty before the Honorable Harold H. Greene on November 12, 1986. Judge Greene ordered that all motions be filed by December 3, 1986, with opposition papers to be filed two weeks later. (App.55-56)[3] The defense wasted no time in its pre-trial preparation. The next day, Petitioner's counsel requested voluntary discovery. He specifically requested information which might exculpate the Petitioner or which would be useful to a defense. Counsel also requested all Jencks material ten days before trial. (See Exhibit

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[3]References in the form "App.___" refer to the Appendix filed by the Petitioner in the Court of Appeals. References in the form "A-__" refer to the Appendix filed as part of this Petition.

A to Defendant Friedman's Motion for Pretrial Discovery)

In their response of November 17, 1986, government counsel claimed to be "anxious to provide . . . the material to which [the defense] are entitled," and "happy" to provide Jencks material . . . ten days before trial." (See Exhibit B to Defendant Friedman's Motion for Pretrial Discovery)

On November 20, 1986, Petitioner's counsel moved to withdraw. (App.56) The following day, new counsel from the lawfirm of Williams & Connelly, entered an appearance on Petitioner's behalf. (App.57)

Per Judge Greene's scheduling order, new counsel filed a number of pre-trial motions on December 3, 1990, including certain discovery motions, and motions to dismiss the indictment for defects apparent on its face. (App.58) The court disposed of the motion by opinion and order dated January 16, 1987. See United States v. Madeoy, 652 F.Supp. 371 (D.D.C.

1987). In addressing the defense motions for discovery, Judge Greene commended the government for its cooperative attitude toward discovery. Id. at 375.

As it turned out, the government's sense of fair play was illusory. The government had withheld from the defense the evidence in its sole possession which showed that black grand jurors harbored racial prejudice against the white defendants. This evidence -- in the form of grand jury transcripts -- showed that the government prosecutors had not only permitted multiple expressions of racial prejudice to go unchallenged in the grand jury, but appeared once to have joined in and endorsed the grand jury's expression of race prejudice. (See App.153-75)

The government had not disclosed this information to the defense prior to the deadline for pre-trial motions. Moreover, despite its agreement to provide Jencks material ten days before trial, it actually

provided the thousands of pages in installments beginning ten days before trial. The last installment was delivered on Friday, February 20, 1987. Trial was scheduled to begin on Monday, February 23, 1987.

Over the weekend, defense counsel found buried in this mountain of paper undeniable evidence of racial bias at work in the grand jury.

Snow closed the courthouse on February 23, 1987, so the parties appeared for trial a day later, on Tuesday, February 24, 1987. Immediately, before jury selection commenced, defense counsel brought the evidence of racial prejudice in the grand jury to the trial court's attention. (App.668, 671) Specifically, defense counsel informed Judge Greene that the grand jury transcripts they had recently received revealed that, on different occasions, three black grand jurors had made remarks reflecting racial prejudice against whites.

The first exchange occurred during the grand jury's questioning of Ritchie Gaylen, a white man, who testified about his role in the alleged conspiracy. Assistant United States Attorneys Tabackman, one of the two prosecutors who presented the case to the grand jury and who prosecuted the resulting indictment, was present. After the jury learned that most of the people who purchased properties or in whose names properties were purchased were black, the following occurred:

> FIRST JUROR: But the money ended up in the white people's pocket. . . .
>
> SECOND JUROR: As always.
>
> FIRST JUROR: As always.
>
> AUSA [Tabackman]: That's correct. Are there any further questions?

(App.168-69, emphasis added)

The second exchange involved a third grand juror, the deputy foreperson, who was black, and Harriette McGinnis, a black witness. Assistant United States Attorney

Allison, the other prosecutor, was present.

> DEPUTY FOREPERSON: You mean to say these people didn't look at this piece of property?
>
> WITNESS: Half of them didn't know. No, they didn't....
>
> DEPUTY FOREPERSON: I can't even believe that.
>
> WITNESS: You'd be surprised what people will do for money.
>
> DEPUTY FOREPERSON: And you being black all your life and you know that the white man takes you any damn time he can and you don't look to see?

(App.172, emphasis added). The stenographic record shows that the collective grand jury responded with "general laughter" to the deputy foreperson's extremely negative stereotype of whites. (App.172)

The third incident took place a week later, in Mr. Allison's presence, at Ms. McGinnis' second grand jury appearance, just one week before the grand jury returned this

indictment.

> DEPUTY FOREPERSON: I sympathize with you, but I have a question. They're going to get mad with me when I say this.
>
> JUROR: You're probably right.
>
> DEPUTY FOREPERSON: You know, we've been -- we were born black, you know.
>
> WITNESS: Definitely.
>
> DEPUTY FOREPERSON: How could you have trusted <u>them</u> so?

(App.174, emphasis added).

Defense counsel brought these facts to Judge Greene's attention and Prosecutor Allison confirmed that the incidents involving Ms. McGinnis had occurred. (A.678) He dispelled any notion that the comments were not serious ones, describing the deputy foreperson as "upset." He added that, as far as he could recall, these were the only

expressions of racial bias in the grand jury.[4] (A.676-77) There was, however, no independent confirmation that these were the grand jury's only racial remarks; the defense lacked access to the complete set of grand jury transcripts and the prosecutors were plainly not the best persons to judge whether they or the grand jurors they supervised had committed additional improprieties.

Defense counsel expressed two concerns. With jury selection scheduled to begin that morning, the defense feared that the petit jurors might also harbor racial biases, and proposed additional voir dire questions to probe racial prejudice. (App.668)

Counsel also voiced concern that race prejudice by the grand jurors had tainted the indictment. Petitioner's counsel informed the court that he had directed his associates to research whether the facts just revealed would

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[4]Mr. Tabackman, who was present in court, said nothing.

support a motion for dismissal of the indictment or other relief. (App.675) While Petitioner's counsel did not formally ask for permission to file a motion at a later date,[5] he made it clear that he intended to make a motion if the law would support it and he reminded the court that he had only recently gotten the transcripts. (App.675)

The court seemingly acquiesced, indicating only that the question was not presently before it. (App.682) At no time did the court indicate that, if a motion were going to be made, it would have to be made before trial began. At no time did the district judge indicate that he would put off choosing a jury or adjourn the trial so that the questions could be researched, and motion papers drafted.

The jury was chosen that day and the trial began. Over the weekend break, the

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[5]Nor did he request any adjournment of the trial, a request which undoubtedly would have been denied.

defense completed its research and drafted motion papers. On Monday, March 2, 1987, Petitioner, joined by his co-defendants, filed a formal motion, under Rule 12(b) of the Federal Rules of Criminal Procedure, to dismiss the indictment on the ground that the grand jury was motivated by racial prejudice. Alternatively, the defendants requested a hearing to inquire whether the grand jurors were influenced by race prejudice in voting to return the indictment. (App.153)

At a break in the next day's proceedings, the court advised the government that there was "no rush" to file a response.[6] Ignoring

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[6]Government counsel, adverting to the pressures of trial, expressed a desire to respond only after the trial ended. The court, however, directed the government to file its response after its own case was in. The court added:

> If it turns out that the defense is right, then we're going -- I mean, it doesn't look like it to me, quite frankly, but if it does turn out after research the defense is

(continued...)

the defense request for a ruling on the motion before verdict,[7] the court submitted the case to the jury more than five weeks later, without having received any response from the government and without having ruled on the motion.

The defense renewed its grand jury challenge in a post-trial motion (App.599) which was denied. (A-20) By memorandum order dated July 17, 1987, the district court ruled that the defendants' objection was "waived" because their lawyers did not raise it by motion prior to trial.[8] (A-22)

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[6](...continued)
right, we are doing all this for nothing.
(App.968)

[7]Counsel for Petitioner had asked for a ruling before the trial ended unless the government would agree not to argue that a guilty verdict would preclude consideration of the issue. The government stood mute. (App.968-69)

[8]There is no suggestion that the defendants themselves knowingly or voluntarily waived this Constitutional claim; any finding of waiver could be based only on their lawyers' conduct.

The court further ruled that the defendants were not entitled to relief from this waiver, because they could not demonstrate "actual prejudice." (A-22) The court reasoned that the effect of any racial prejudice in the grand jury "was overcome" when the petit jury rendered its verdict. (A-25) The court added that it did "not doubt that due process protects a defendant from an indictment that is plainly the product of racial prejudice." (A-25) It held, however, that the facts did not demonstrate "such bias" by the grand jury "as a body." (A-26)

The Court of Appeals affirmed. It agreed that the defendants' failure to move to dismiss the indictment prior to trial constituted a waiver of their claim of grand jury bias. (A-6,7) And it refused to disturb the district court's refusal to grant relief from that waiver. (A-9) It held that, in deciding whether to grant relief from waiver, the court should consider the reason for the

defendant's tardiness and whether he has shown actual prejudice. (A-7) The Court of Appeals found neither prejudice nor excuse.

According to the Court of Appeals, there could be no excuse for failing to make the motion before trial, because the defense had discovered the offensive remarks before the trial started. (A-8) The Court rejected, or ignored, the argument that the failure to make the motion before trial began was justified in light of the need to research the law.

The Court further ruled that the defendants had not shown "actual prejudice." The Court reasoned that it was not likely that, but for the biased remarks, the grand jury would not have indicted the defendants on the same counts. (A-9) The Court ended its discussion with these words:

> [D]espite our determination that the appellants have failed to show actual prejudice, we in no way condone the racial bias revealed in the comments made during the grand jury

> proceedings. We are troubled not only by the grand jurors' remarks, but more so by the failure of the AUSA's who were present to admonish the speakers and to make clear that any biases they harbor must play no role in the matter at hand. Such official complacency, perhaps even opportunism, when racial bias infiltrates the criminal justice system is not tolerable. While the appellants appear not to have been victimized by it, the public suffers whenever the appearance of racial bias goes uncorrected in the courthouse.

(A-9)

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' AFFIRMANCE OF THE DISTRICT COURT AND ITS CONSTRUCTION OF RULE 12 TO FIND WAIVER IN THIS CASE LEFT OUTRAGEOUS RACIAL DISCRIMINATION IN THE FEDERAL COURTHOUSE UNADDRESSED AND UNREMEDIED AND DEPRIVED THE PETITIONER OF DUE PROCESS OF LAW

The Court of Appeals for the District of Columbia Circuit has held that, under Fed. R. Crim. P. 12, a defendant's claim that he was indicted by a racially-prejudiced grand jury is waived if it is not made before trial. The Court so ruled even though, when racial prejudice infects the grand jury, that fact is almost always hidden in secret grand jury transcripts to which the defendant has no pre-trial right of access and even though the defendant's motion to dismiss based on grand jury prejudice was made within days of discovering the grand jury abuses.

In the instant case, portions of the

grand jury transcripts which revealed racial bias were found by defense counsel within a huge pile of Jencks material turned over to the defense just before the trial began.[9] However, under the Court's unambiguous holding, waiver of any claims based on grand jury race bias occurs as soon as the trial begins regardless of when the defendant discovers that racial prejudice infected the grand jury. This is so even if the defense, though it has exercised due diligence, first learns the facts after the trial has begun,[10]

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[9] It is not inconceivable that the government produced Jencks material immediately before trial rather than after the witnesses' direct testimony, in a conscious effort by the prosecutors to appear to be forthcoming while simultaneously depriving the defendants of any meaningful opportunity to use the information demonstrating race prejudice in the grand jury.

[10] The Court of Appeals said:

> A defendant who receives Jencks Act material only after his trial has begun, and is thus first apprised of the facts upon which the motion to

(continued...)

even if the defense makes its motion immediately upon learning the facts, and even if the government has participated in and profited from the grand jury prejudice, and hidden the evidence of it from the defendant.

The Court of Appeals' ruling violates the Fifth Amendment. The Constitutional guarantee of due process means that a defendant must be afforded a reasonable opportunity to present his Constitutional claims before court rules or procedures can bar their assertion. See Michel v. Louisiana, 350 U.S. 91 (1955); Reece v. Georgia, 350 U.S. 85 (1955). Due process thus forecloses any reading of Rule 12 which renders claims like Petitioner's waived before a reasonable time to assert them has passed.

The Court of Appeals' cramped reading of

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[10](...continued)
dismiss the indictment is based, may be in a position to argue good cause for his failure to have moved for dismissal prior to trial.

(A-8, emphasis added).

the "relief from waiver" provision of Rule 12(f) does not solve the problem. Whether a defendant is to be given a reasonable time to assert his Constitutional claims cannot rest in the essentially unreviewable discretion of the district courts.[11]

The Court of Appeals has rewritten Rule 12 in a particularly mischievous fashion. While purporting to rely on decisions of this Court which construed former Rule 12, such as Davis v. United States, 411 U.S. 233 (1973), and Shotwell Mfg. Co. v. United States, 371 U.S. 341 (1963), the Court went far beyond the holdings or the reasoning of those cases.

The Court of Appeals' decision also ignores the plain teaching of more recent

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[11]Moreover, given the Court of Appeals' reading of the relief from waiver provision, district courts should never exercise their discretion to grant a defendant relief; a defendant will rarely be able to demonstrate legally cognizable excuse for his unavoidable "procedural default," and will never be able to demonstrate prejudice from the court's refusal to decide his claim, as the Court of Appeals has defined those requirements.

cases such as Vasquez v. Hillery, 474 U.S. 254 (1986), Mechanik v. United States, 475 U.S. 66 (1986), and Bank of Nova Scotia v. United States, 487 U.S. 250 (1988), pertinent precedents on the remediability of improprieties and misconduct involving the grand jury.

This Court has quite properly held that racial discrimination in the selection of the grand jury is intolerable, and grounds for dismissal of an indictment, even where the petit jury has rendered a verdict after a trial free from any taint of racial bias. Vasquez v. Hillery, 47 U.S. 254 (1986); see also United States v. Mechanik, 475 U.S. 66, 70 n.1 (1986). Where improprieties have occurred in the grand jury itself, this Court has held that dismissal of an indictment is appropriate if the improprieties substantially influenced the grand jury's decision to indict or if there is grave doubt as to whether the improprieties substantially influenced the

decision. Bank of Nova Scotia v. United States, 487 U.S. 250 (1988). Yet, the Court of Appeals' ruling necessarily means that meritorious claims of unconstitutional racial discrimination in and by federal grand juries, encouraged or condoned by federal prosecutors, will escape judicial scrutiny; they will have been waived, by operation of law, before the defendant has any way to know that he has been the victim of racial discrimination or of official complacency in the face of such discrimination.[12]

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[12] Justice Marshall's comments, in his dissent in United States v. Mechanik, 475 U.S. 66, 81-82 (1986), about violations of Rule 6(d) are equally pertinent here:

> [V]iolations are difficult for defendants to uncover. The grand jury conducts its investigation in secret, aided only by the prosecutors and witnesses. United States v. Calandra, 414 U.S. 338, 343, 94 S.Ct. 613, 617, 38 L.Ed.2d 561 (1974). Defendants are not entitled to grand

(continued...)

[12](...continued)
jury transcripts before trial; due to the strictly enforced tradition of grand jury secrecy, defendants generally have access to no information whatsoever regarding the conduct of the grand jury proceedings. See M. Frankel & G. Naftalis, The Grand Jury 81-89 (1977). Requests by defendants pursuant to Rule 6(e)(3)(C)(ii) for disclosure of grand jury materials, "upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury," are rarely granted; a defendant often can make the necessary showing only with the aid of the materials he seeks to discover. See 1 C. Wright, Federal Practice and Procedure §108, pp.263-265 (2d ed. 1982). Defendants' only access to grand jury materials is likely to be through the medium of the Jencks Act, 18 U.S.C. §3500, which requires the prosecutors, after direct examination of a

(continued...)

The holding does not simply make a mockery of the principle that the federal courts will not tolerate racial prejudice. It makes the courts knowing participants in proceedings borne of officially-sanctioned racial hatred. Pious condemnations of

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[12](...continued)

> government witness, to produce the witness' prior statement. That disclosure, however, does not take place until after trial has begun, and then only on a piecemeal and incomplete basis.
>
> There is thus little likelihood that a defendant can raise a substantial claim under Rule 6(d) before his trial begins.

For the same reasons, there is little likelihood that the defendant can raise a substantial claim of grand jury bias before his trial begins. Unless the acts of racial prejudice occur during the grand jury appearance of the defendant or a witness friendly to the defendant, the grand jury secrecy rules, Fed. R. Crim. P. 6, virtually guarantee that the defendant will not become aware of them. Those however are the occasions on which grand jury prejudice is least likely to be apparent.

prejudice come to nothing if the federal courts will not act in cases like this one.

Hiding behind the Federal Rules of Criminal Procedure will not do. The Court of Appeals' holding -- that a challenge to grand jury racial prejudice which is known to the prosecutors and tolerated or encouraged by them is waived if not made before the trial begins -- does not even comport with the language of Rule 12. Rule 12 is specific, and says something different. Rule 12(b) identifies certain motions which may, or which must, be made before trial. Among those in the "must" category are "defenses and objections based on defects in the institution of the proceeding." Rule 12(b)(1). Rule 12(c) provides that "[u]nless otherwise provided by local rule, the court may, at the time of arraignment . . . set a time for the making of pretrial motions or requests." Under Rule 12(f), waiver occurs if a party fails to raise objections which must be made

before trial "by the time set by the court pursuant to subdivision (c)."[13] See United States v. LaRouche Campaign, 682 F.Supp. 610 (D. Mass. 1987).

Petitioner's objection may not even fall within Rule 12(b)(1). Rule 12(b)(1) deals with "defects in the institution of criminal proceedings," and could be limited to challenges which do not turn on access to grand jury minutes, since those minutes are generally discoverable, if they are discoverable at all, under the Jencks Act

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[13] Although in Petitioner's case a formal motion was not filed until four trial days after the issue had first been raised with the district court, it would hardly do violence to plain English to say that, when the facts were presented in detail to the district judge before voir dire, the issue had been "raised prior to trial," within the meaning of the Rule 12(b). Such a reading of the Rule, limited to circumstances like these, does not threaten to destroy Rule 12's timeliness requirement or otherwise to open a flood gate for those who would prefer not to bring on a grand jury motion prior to trial for fear of reindictment.

during the trial.[14] But even if Rule 12(b)(1) covers claims of grand jury misconduct, waiver of those claims cannot occur unless the defendant has had a reasonable opportunity to assert them, even if the trial has already begun.[15] If factual grounds for a challenge

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[14]This narrower construction would be consistent with the Rule's purpose. Rule 12 was designed to cover challenges which, by their nature, are obvious on the face of the indictment or otherwise ascertainable by the defense, prior to trial. Matters which occurred in the grand jury and which, because of grand jury secrecy rules, are not ascertainable by the defense at all, or at least not until the government produces grand jury transcripts it is obligated to disclose under the Jencks Act, do not fit comfortably into those categories. A construction of Rule 12 which excluded such challenges from the time requirements of the Rule would thus be appropriate.

[15]If the Petitioner's motion to dismiss the indictment for officially-tolerated or officially-encouraged grand jury bias revealed in the grand jury transcripts produced under the Jencks Act is a motion which must be made before trial, and if the district court had, accordingly, applied Rule 12(f), it would have to have considered whether there was good cause for the failure to have made the motion before the date set for pre-trial motions. Plainly, there was a legally recognized excuse for not having made the motion by that date. The defendants simply had no knowledge and no

(continued...)

are discovered just before trial, defense counsel should not be forced to act immediately, or forever lose the opportunity to act at all. An attorney is not required to "shoot from the hip," without researching the pertinent precedents which would both enable him to make a professional judgment about the legal validity of the challenge and permit him to bring to the court's attention the relevant authorities.[16]

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[15](...continued)
way of knowing that grounds for a motion lay at that time. See Murray v. Carrier, 477 U.S. 478, 488 (1986) (cause exists for a state procedural default, and thus the default will not bar federal habeas corpus review, where the factual basis for a claim was not reasonably available to defense counsel).

[16]Forcing a lawyer to act immediately creates an inherent conflict between the lawyer, who must strive to be lawyerlike and professional in his dealings with the court, and the defendant, whose ability to assert a claim would depend on his lawyer's acting in an unlawyerlike and unprofessional manner.

In this case, counsel, aware of his obligations to the court and to his client, advised the district judge that he needed an opportunity to research the law, and, if justified, to file a motion. The district
(continued...)

The Court of Appeals' holding is not suggested or compelled by any decision of this Court. This Court has never held that defense challenges to an indictment based on racial improprieties by the grand jury are covered by Rule 12(b)(1). Nor has this Court suggested or held that a defendant forfeits his right to challenge such misconduct where the government has withheld the evidence of it from him, and the defendant raises his claim promptly upon learning it, only days into a lengthy trial. Davis and Shotwell, upon which the Court of Appeals relied, were very different cases.[17] In Shotwell, the defendants first attacked the

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[16](...continued)
court seemed to acquiesce. The government voiced no objection. If the court did not by such acquiescence grant either relief from the waiver or an extension of time to make the motion, see Fed. R. Crim. P. 12(f), it certainly lulled the defendant into believing that it had done so.

[17]Both were decided under the former Rule 12, which contained a different waiver provision. Both predated this Court's recent decisions concerning the fundamental importance of eliminating racial discrimination from the grand jury.

grand jury array (though not, apparently, on the basis of racial discrimination) four years after their trial and conviction on federal charges. This Court held that they had "lost these objections by years of inaction." 371 U.S. at 362. The Court also noted that the district court had made findings of fact regarding when the challenge could first have been brought.

Davis v. United States, 411 U.S. 233 (1973), does not support the Court of Appeals' ruling, either. By motion under 28 U.S.C. §2255, Davis, a federal prisoner asserted, for the first time, a claim of unconstitutional racial discrimination in the composition of a grand jury, three years after his conviction. As in Shotwell, this Court again cited the district court's findings concerning the absence of excuse. Id. at 243.[18] The Davis

[18]In Petitioner's case, the district court made no inquiry into or findings concerning when the defense first learned of the improprieties of the prosecutors and the grand (continued...)

[18](...continued)
jurors and when they might reasonably have acted on the discovery. The district court's decision in fact grossly misstates the scanty record which did exist, stating only:

> Although defendants imply that they lacked an earlier opportunity to raise the issue, the fact is that the government turned over the grand jury transcript to them at least ten days prior to the trial -- ample time within which to raise the issue properly.

These facts are contrary to the record. While the government had, indeed, promised to turn Jencks Act transcripts to the defense ten days before trial, it in fact began providing the transcripts in installments ten (not more than ten) days before trial. The last installment was delivered the Friday before the trial was to begin. The offending remarks and prosecutorial inaction and/or concurrence may have been within transcripts delivered in the very last batch.

Further, possession of the transcripts was not equivalent to knowledge of their contents. Jencks Act material is made available to the defense, and used by defense counsel, for cross-examination of prosecution witnesses. Although the record shows that the defense attorneys began their review of the transcripts upon receiving them, before any witnesses had testified, the record is silent as to the order in which the reading took place, when defense counsel came upon the

(continued...)

Court expressed concern that refusal to enforce the waiver provisions of the former Rule 12 would encourage tactical withholding of claims.

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[18](...continued)
racist incidents, or when the pattern of racist remarks emerged. But one thing is clear: the record does not support the district court's assertion, critical to its ruling, that the defense had "at least ten days prior to trial to raise the claim."

The Court of Appeals recognized the error in the district court's reading of the factual of record. It noted that, "During the ten days prior to trial, the Government gave the appellants about 2000 pages [of Jencks Act material], in installments, the last of which was apparently received on the Friday before the Tuesday when the trial started." (A-8) But the Court of Appeals then deemed these facts irrelevant because the defendants "concededly discovered the offensive comments before trial." (A-8) Without knowing when before trial the discovery was made, the Court of Appeals' premise does not justify its result -- unless the rule is that a motion must be made immediately upon learning the facts upon which it is based. This cannot be the law, for an attorney is ethically foreclosed from making motions unless he believes that they are supported by fact and by law. Cf. Fed. R. Civ. P. 11 (attorney may not make motion unless he believes "after reasonable inquiry" that it is well grounded in fact and is warranted by existing law or good faith argument for the extension, modification, or reversal of existing law).

Those concerns are absent here. Petitioner did not "sleep on his rights through years of inaction." His motion was made within a week of discovering the factual grounds for it, and as soon as the necessary legal research and drafting could be done. He did not hold his claim in reserve waiting to see what the jury verdict would bring; on the contrary, he explicitly requested a ruling on his claim before the case was sent to the jury. And the court's ability to decide the claim of discrimination in the grand jury was exactly the same when the motion was made as it would have been if made a few days earlier.

Thus, granting relief from waiver where the defendant has brought a challenge to grand jury bias within days of discovering it and long before his trial has ended would not encourage the holding back of claims for tactical reasons. Refusing to grant relief from waiver will, however, embolden prosecutors to engage in, permit, and profit

from racial discrimination in the grand jury proceedings they oversee. It will also encourage prosecutors to sandbag defendants by withholding the evidence of wrongdoing until the time when the defendant will be in the worst possible position to act on it.

Both courts below also erred in analyzing prejudice. The district court ruled that the defendants could not have been prejudiced by racial bias in the grand jury because the effect of grand jury prejudice was overcome when the petit jury returned its verdict. This analysis does not survive Vasquez v. Hillery, 474 U.S. 254 (1986), where this Court reaffirmed that racial discrimination in the grand jury does not become harmless after a petit jury has convicted.

The Court of Appeals eschewed the district court's analysis but adopted one which is equally flawed. It held that a defendant must show actual prejudice, and that

three isolated remarks made in the course of lengthy hearings were all that the defendants could point to. According to the Court, it was not likely that "but for the remarks, the grand jury would not have indicted . . . on the same counts." (A-9)

The analysis is specious. On this record, it cannot be assumed that these three examples of expressions of racial bias by the grand jury were all that occurred; the defendants were denied the hearing they requested to explore the full extent of grand juror bias. Moreover, these three incidents were more than enough to show that the proceedings were tainted by race bias. The transcripts to which the Petitioner pointed recorded not only general, collective laughter by the grand jury, but a total failure to act in the face of multiple racist remarks, if not active approval of them, by the official representatives of the government.

Equally significant, the Court of Appeals

miscomprehended the nature of the defendants' claim. Their claim was not that these improper remarks affected the grand jury. Their claim was that the grand jurors who made and ratified these remarks were biased against them on racial grounds, and that the prosecutors, through inaction and concurrence, legitimated the voting of an indictment for racial reasons.

Violation of the right to a racially unbiased grand jury is presumptively prejudicial. Discrimination in the selection of the grand jury is presumed to prejudice in part because it can be presumed that a discriminatorily selected grand jury would treat defendants of excluded races unfairly. Mechanik v. United States, 475 U.S. 66, 71 n.1. A fortiori, prejudice must be presumed when the grand jurors themselves in the course of performing their official duties show, by their own utterances, that they harbor prejudice against the defendants' race. After

all, individual grand jurors selected under procedures which exclude members of a particular race may still treat members of the excluded race fairly. Where, as here, it is the grand jurors themselves who voice racial biases, and whose conduct is ratified by the prosecutors, then it cannot be assumed that this grand jury can and will treat defendants of the disfavored race fairly, especially in cases like this one which have a racial element.

To be sure, reversal of a criminal conviction entails substantial societal costs. But these costs are ones which could have been avoided had the government prosecutors refused to allow race prejudice to taint the grand jury proceedings; had they made early, rather than eleventh-hour, disclosure of the wrongdoing in the grand jury; or had the district court acted promptly on the motion which was made. No societal costs will be incurred if the government takes care that

racial discrimination not be permitted to infect grand jury proceedings.

The societal costs of refusing to confront the Constitutional issue raised are, on the other hand, enormous. In one respect, the Court of Appeals was absolutely right.

> [T]he public suffers whenever the appearance of racial bias goes uncorrected in the courthouse.

"[W]hen racial bias infiltrates the criminal justice system," complacency by the courts -- no less than by government prosecutors -- is "intolerable."

The petition for a writ of certiorari should be granted to consider whether Rule 12 permits -- or mandates -- complacency and inaction in the face of racial bias in the courthouse, as the Court of Appeals has held.

II. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE SAME RULE APPLIES WHETHER RACIAL DISCRIMINATION IS PRACTICED BY WHITES AGAINST BLACKS OR BY BLACKS AGAINST WHITES, AND WHETHER, IN EITHER CASE, THERE IS A PER SE RULE THAT AN INDICTMENT IS VOID WHERE OVERT RACIST REMARKS WERE MADE BY THE GRAND JURORS IN THE COURSE OF THEIR OFFICIAL PROCEEDINGS, AND THE PROSECUTORS DID NOTHING TO COUNTER, OR AFFIRMATIVELY JOINED IN, THE EXPRESSIONS OF RACE HATRED

The constitutional question this case presents is whether an indictment is void when it is returned by a grand jury which has made manifest its racial biases against the defendants' race in the course of its official proceedings. The real underlying question may be whether racial discrimination in the courthouse will be treated the same whether it is practiced by whites against minority races or by "minorities" against whites. Both the district court and the Court of Appeals

assumed that all federal defendants, white or black, have a right guaranteed by the Fifth Amendment to a grand jury free of racial bias and racial prejudice. Those courts, in addition, recognized the unambiguously racist nature of the grand jurors' statements in this case. Petitioner respectfully submits that, if white grand jurors considering the indictment of a black person made "us" against "them" statements like those made here, and the prosecutors took no steps to make clear that racial bias could have no part in the grand jury proceedings, the courts would have acted -- regardless of when the defendant raised his claim of racial discrimination. Indeed, a federal judge could have acted sua sponte on these facts, to protect the integrity of the courts, without awaiting any defense motion. Petitioner submits that the manipulation of Rule 12 to find waiver in this case reflects disparate treatment of racial discrimination when it is practiced by blacks,

rather than against blacks. The courts' failure to take seriously the black against white discrimination in this case is itself such a departure from acceptable judicial conduct that it merits review by this Court.

Petitioner also submits that the unprecedented waiver rulings below may rest on the judges' unspoken, but nevertheless real, reluctance to face what they perceived to be the implications of recognizing the Constitutional right which they both insisted exists. This reluctance apparently stems from the courts' desire to avoid judicial inquiry into the basis for a grand jury's decision to indict. But vindication of the defendant's right not to be tried on an indictment which is the product of grand jury proceedings infected by racial bias need not mean judicial intrusion into the thought processes or behavior of individual grand jurors. Dismissal of the indictment is appropriate on the record which presently exists, without the

necessity for any further inquiry, for that record shows that the grand jury process was tainted by overt racism which the federal prosecutors ignored or affirmatively joined. A per se rule should be established under which such an indictment must be deemed void.

In Costello v. United States, 350 U.S. 359, 363 (1956), this Court said, in dictum, that the Fifth Amendment requires "a legally constituted and unbiased grand jury." See also Beck v. Washington, 369 U.S. 541 (1962); Lawn v. United States, 355 U.S. 339, 349-50 (1958). What "unbiased" means is, however, unclear. For the most part, the reported cases concern grand jurors' alleged bias as a result of their exposure to prejudicial publicity, not racial bias of the grand jurors against those of the defendant's race. For the most part, the courts have rejected claims of grand jury bias. See generally J. Bartlett, Defendant's Right to an Unbiased Federal Grand Jury, 47 Boston U.L. Rev. 551

(1967). But grand jury bias in the form of racial prejudice raises different concerns, and mandates a different judicial response.

This Court has repeatedly held that a conviction cannot stand where the indicting grand jury is the product of racial prejudice or racial discrimination. See, e.g., Vasquez v. Hillery, 474 U.S. 254 (1986), citing Neal v. Delaware, 103 U.S. 370, 396 (1881); Bush v. Kentucky, 107 U.S. 110 (1883); Gibson v. Mississippi, 162 U.S. 565 (1896); Carter v. Texas, 177 U.S. 442 (1900); Rogers v. Alabama, 192 U.S. 226 (1904); Pierre v. Louisiana, 306 U.S. 354 (1939); Smith v. Texas, 311 U.S. 128 (1940); Hill v. Texas, 316 U.S. 400 (1942); Cassell v. Texas, 339 U.S. 282 (1950); Reece v. Georgia, 350 U.S. 85 (1955); Eubanks v. Louisiana, 356 U.S. 584 (1958); Arnold v. North Carolina, 376 U.S. 773 (1964); Alexander v. Louisiana, 405 U.S. 625 (1972). See also Rose v. Mitchell, 443 U.S. 545 (1979). In part these holdings rest on the notion that a

discriminatorily selected grand jury must be presumed to have treated a member of the excluded race unfairly, and in part on the notion that the only effective means of eradicating racial discrimination in grand jury selection rests in permitting defendants to challenge it.

This Court has also consistently recognized that a conviction is void under the Equal Protection Clause if the prosecutor deliberately charged the defendant on account of his race. See United States v. Batchelder, 442 U.S. 114, 125 & n.9 (1979); Vasquez v. Hillery, supra, 474 U.S. 254, 264. See also Oyler v. Boles, 368 U.S. 448, 456 (1962) (Equal Protection Clause prohibits selective enforcement based upon an unjustifiable standard such as race, religion, or other arbitrary classification).

Similarly, an indictment returned by the grand jury because of the defendant's race is not valid. When race is a "motivating factor"

in the grand jury decision, its indictment cannot stand. Cf. See Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 274 (1977).

To be sure, there are costs associated with inquiry into the motives or actions of the grand jury or its members. Cf. Wayte v. United States, 470 U.S. 598, 607-09 (1985) (inquiry into prosecutor's decision to prosecute). But, where evidence of bigotry or bias exists, there are costs associated with refusal to inquire, as well. While the bias of individual grand jurors or an individual grand jury may not implicate the "structural integrity," Vasquez v. Hillery, supra, 474 U.S. at 263, of the grand jury in precisely the same way that discrimination in the selection of the grand jury does, the basic integrity of the grand jury process is nonetheless compromised -- and the governmental authorities fully implicated -- where, as here, the grand jurors made bigoted

comments, and the prosecutors, at best, failed to caution the jurors against acting on the basis of racial prejudice, and, at worst, joined in the expression of race hatred. If other societal interests suggest that inquiry into grand jurors' motives must be avoided, then that inquiry can be bypassed. Indictments like Petitioner's should be dismissed without further examination of what went on in the grand jury, simply on the basis of the sad record which presently exists.

III. THE COURT OF APPEALS' CONCLUSION THAT THE ISSUE WHETHER A VETERANS ADMINISTRATION FEE APPRAISER IS A PUBLIC OFFICIAL FOR PURPOSES OF THE BRIBERY STATUTE, 18 U.S.C. §201(a), IS AN ISSUE OF LAW TO BE DECIDED BY THE COURT VIOLATES PETITIONER'S RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENTS TO HAVE EACH ESSENTIAL ELEMENT OF A CRIMINAL OFFENSE DECIDED BY A JURY

Petitioner joins the argument made in the separate petition filed on behalf of Steven F. Madeoy and Jakey Madeoy.

CONCLUSION

For the reasons stated, Petitioner respectfully prays that the writ of certiorari be granted.

Respectfully submitted,

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Dated: December 28, 1990
New York, New York

A P P E N D I X

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 22, 1989 Decided August 10, 1990

Nos. 87-3085, 87-3086, 87-3088

UNITED STATES OF AMERICA

v.

STEVEN F. MADEOY, *et al.*, APPELLANTS

Appeal from the United States District Court
for the District of Columbia

(No. 86-00377-01)

James Hamilton, appointed by this Court, with whom *Mary C. Albert* was on the brief, for appellants Steven F. Madeoy and Jakey Madeoy in 87-3085 and 87-3086.

John W. Vardaman, appointed by this Court, with whom *John P. Monahan* was on the brief, for appellant Michael J. Friedman in 87-3088.

Thomas C. Black, Assistant United States Attorney, with whom *Jay B. Stephens*, United States Attorney, and

John R. Fisher, Assistant United States Attorney, were on the brief for appellee in all cases. *Steven C. Tabackman* and *Donald J. Allison*, Assistant United States Attorneys, also entered appearances for appellee.

Before EDWARDS, WILLIAMS, and D. H. GINSBURG, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* D. H. GINSBURG.

D. H. GINSBURG, *Circuit Judge*: Appellants Steven Madeoy, Jakey Madeoy, and Michael Friedman were indicted for their participation in a scheme to defraud the Federal Housing Administration. The indictment alleged that the appellants

> and others unjustly and illegally [enriched] themselves ... by receiving money from and on account of FHA-insured loans which were fraudulently obtained as a result of the bribery of public officials and the knowing submission of false, fraudulent, and misleading statements to the FHA and to the [Veterans Administration].

Each of the three appellants was charged with one count of conspiracy (18 U.S.C. § 371), and one count of participating in the conduct of the affairs of an enterprise through a pattern of racketeering activity (18 U.S.C. § 1962(c) (RICO)). Steven Madeoy and Michael Friedman were charged with 14 counts of giving a bribe to Jakey Madeoy, a VA fee appraiser, and he was charged with 14 counts of accepting a bribe (18 U.S.C. § 201(b), (c)). Steven Madeoy and Michael Friedman were charged with 45 counts of making "false, fictitious or fraudulent statements or representations" to the Department of Housing and Urban Development and to the VA (18 U.S.C. § 1001), 12 counts of wire fraud (18 U.S.C. § 1343), and 11 counts of interstate transportation of property obtained by fraud (18 U.S.C. § 2314 (ITPOF)). Jakey Madeoy was also charged with 22 counts of making false statements to the VA (18 U.S.C. § 1001). The indictment sought forfeiture under RICO (18 U.S.C. § 1963(a)(1),

(3)), of various properties allegedly acquired by the defendants through their racketeering activity.

The evidence at trial showed that Steven Madeoy entered into purchase contracts with the owners of 23 properties and then listed those properties for resale with a real estate brokerage. The brokerage found a prospective purchaser for each property and referred him to a mortgage company, which in turn prepared mortgage insurance applications and submitted them to the FHA. In order for the FHA to determine the amount of the loan that it would insure, it required an appraiser to estimate the value of a property; for 22 of the properties, Jakey Madeoy, a VA-approved fee appraiser, performed that function. For each property, he submitted to the VA a Residential Appraisal Report with an inflated appraisal, upon which the VA relied in issuing a Certificate of Reasonable Value. The FHA, in turn, relied upon the Certificate in issuing a conditional insurance commitment for each of the properties.

Following receipt of the FHA's conditional commitment, settlement took place through Michael Friedman's law office, and the mortgage company transferred the loan proceeds to Friedman's escrow account, either by interstate wire or by interstate mail. Friedman then falsified the closing documents in order to indicate that each purchaser had made the required minimum down-payment on the property. He also impermissibly disbursed the loan proceeds to various participants in the scheme. Through the scheme Steven Madeoy received $199,860 of the loan proceeds; Jakey Madeoy received $14,042; and Michael Friedman received $20,696.

The jury returned guilty verdicts against all three appellants. Steven and Jakey Madeoy were each convicted on all counts other than one bribery count and two false statement counts; Michael Friedman was convicted on all counts other than one bribery count. Following a separate deliberation, the jury returned a special verdict requiring each appellant to forfeit various properties pursuant to

the RICO count. The district court sentenced each defendant to a period of incarceration and ordered each to pay a special assessment, make restitution, and, pursuant to the RICO count, forfeit the assets identified by the jury.

The appellants raise numerous challenges to their convictions and to the forfeitures ordered by the district court. After reviewing their principal challenges below, and having considered their other arguments, we conclude that the district court committed no reversible error. We therefore affirm the convictions on all counts.

I. Grand Jury Bias

We address first the appellants' claim that their indictment must be dismissed due to racial bias on the part of some members of the grand jury that indicted them. Because we conclude that the appellants waived their claim by failing to file a timely motion to dismiss the indictment under Federal Rule of Criminal Procedure 12(b), and that the district court did not abuse its discretion in declining to grant relief from this waiver under Rule 12(f), we reject the claim without considering its merits.

A. *The Grand Jury Proceedings*

During the two year-long grand jury proceeding, three grand jurors made remarks suggesting that they harbor racial prejudice against white people (such as the appellants). The Assistant U.S. Attorneys (AUSAs) presenting the case to the grand jury failed to caution the jurors that such remarks were inappropriate and that racial prejudice could play no role in their determination of whether to return an indictment; one of the prosecutor's comments could even be interpreted as an endorsement of race prejudice.

The first exchange occurred after the jury learned that most of the people who, at the instance of Steven Madeoy, purchased properties, or in whose names properties were purchased, were black:

FIRST JUROR: But the money ended up in the white people's pocket. . . .

SECOND JUROR: As always.

FIRST JUROR: As always.

AUSA: That's correct. Are there any further questions?

The second exchange, which occurred two months later, involved the deputy foreperson and a black witness:

DEPUTY: You mean to say these people didn't look at this piece of property?

WITNESS: Half of them didn't know. No, they didn't. . . .

DEPUTY: I can't even believe that.

WITNESS: You'd be surprised what people will do for money.

DEPUTY: And you being black all your life and you know that the white man takes you any damn time he can and you don't look to see?

WITNESS: Miss, I'll tell you what — (GENERAL LAUGHTER)

The third incident took place a week after the second:

DEPUTY: I sympathize with you, but I have a question. They're going to get mad with me when I say this.

JUROR: You're probably right.

DEPUTY: You know, we've been — we were born black, you know.

WITNESS: Definitely.

DEPUTY: How could you have trusted them so?

B. *The District Court's Decision*

Four business days after the trial started, the appellants filed a motion to dismiss the indictment due to grand jury racial bias or, alternatively, for a voir dire of

the grand jurors in order for the court to determine "the exact role that racial prejudice played in the return of the Indictment." The court later denied the motion, noting that the defendants filed it "almost a week after the trial began, entirely out of compliance with [Rule 12]." The court acknowledged that "counsel for one of the defendants made oral reference to the grand jury remarks on the first day of trial, just before the voir dire was about to begin." It went on to observe that "that reference was not framed in terms of an attack on the grand jury or the indictment but rather in terms of a proposal for voir dire questions to the petit jury. Thus, the Court had neither a written nor an oral challenge to the indictment before it at that time." The court therefore concluded:

> Although categorization of individuals based on their race or color is certainly to be condemned, in the context of facts here the references do not demonstrate such bias by the grand jury as a body that, especially in view of the belated defense effort to raise the issue, either a dismissal of the indictment or a voir dire of last year's grand jury is required.

C. *Analysis*

The appellants' claim is clearly subject to the requirements of Rule 12: "By its terms, [the Rule] applies to both procedural and constitutional defects in the institution of prosecutions which do not affect the jurisdiction to the trial court." *Davis v. United States,* 411 U.S. 233, 236-37 (1973). Rule 12(b) provides: "Defenses and objections based on defects in the indictment or information" "must be raised prior to trial." Per Rule 12(f), "Failure by a party to raise defenses or objections or to make requests which must be made prior to trial ... shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver."

We agree with the district court that the appellants' failure to object to the indictment prior to trial constituted a waiver of their claim of grand jury bias. Even assuming that Rule 12 does not require a "writing or for-

mally denominated" motion, *United States v. Oaks*, 508 F.2d 1403, 1404-05 (9th Cir. 1974), the appellants failed to comply with the substance of the rule. Our review of the relevant portions of the transcript leaves no doubt that, although the grand jurors' apparent bias was discussed briefly just before the trial began, none of the defendants challenged the indictment upon that basis.

We need not decide whether, as the Government maintains, the district court's conclusion that the objection was not raised before trial is subject to review only for clear error. Regardless of how much or little deference we owe to the district court, we could not disagree with its conclusion that, under Rule 12, the appellants waived their objection to the grand jury proceedings.

We turn, therefore, to the question whether the district court, "for cause shown," should have "grant[ed] relief from the waiver," pursuant to Rule 12(f). The decision whether to grant such relief is "within the sound discretion of the trial judge," and "will be disturbed on appeal only for clear abuse of discretion." *United States v. Rodriguez*, 738 F.2d 13, 16 (1st Cir. 1984); *see also Davis*, 411 U.S. at 245.

In deciding whether to grant relief from a Rule 12 waiver, a district court should take into account the reason for the defendant's tardiness and whether he has shown that he is actually prejudiced by the defect in the indictment of which he complains. *See id.* at 243-45; *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 361-63 (1963). The Supreme Court has left open whether the defendant must always show both excuse for his noncompliance with Rule 12(b) and actual prejudice, or whether a court should somehow balance these factors in deciding whether the defendant has shown "cause" for relief from waiver under Rule 12. *Murray v. Carrier*, 477 U.S. 478, 494 (1986). Since we are not persuaded by the appellants' arguments with respect to either prejudice or excuse, however, we need not resolve that issue today.

By way of excuse, the appellants argue that they had at most ten days in which to sift through a large amount

of Jencks Act material. (During the ten days prior to trial, the Government gave the appellants about 2000 pages, in installments, the last of which was apparently received on the Friday before the Tuesday when the trial started.) The problem of dealing with a large volume of material in a short period of time before a complex trial begins is not uncommon, however. We must therefore look skeptically upon the appellants' claim, lest the pressure inherent in a criminal proceeding becomes a tool by which a defendant can disrupt his trial. As the Supreme Court stated in *Davis*, "If defendants were allowed to flout [Rule 12's] time limitations, ... there would be little incentive to comply with its terms when a successful attack might simply result in a new indictment prior to trial. Strong tactical considerations would militate in favor of delaying the raising of the claim ...." 411 U.S. at 241. A defendant who receives Jencks Act material only after his trial has begun, and is thus first apprised of the facts upon which his motion to dismiss the indictment is based, may be in a position to argue good cause for his failure to have moved for dismissal prior to trial. The appellants in this case, however, not only had the material, but had concededly discovered the offensive comments before trial, notwithstanding the time pressure during the preceding ten days; that time pressure cannot, therefore, excuse their failure to make a motion on the morning that the trial began.

With respect to prejudice, the appellants contend that they do not have to show actual prejudice because, under *Vasquez v. Hillery*, 474 U.S. 254, 260-64 (1986), prejudice is presumed when a defendant is indicted by a racially biased grand jury. In *Hillery*, racial bias had been a factor in determining the composition of the grand jury. Even if the presumption of prejudice in a compositional case would otherwise carry over to one in which a constitutionally composed jury is marred by exposure to the racially biased remarks of a few individual grand jurors, *Hillery* is inapposite to this case for the simple reason that the motion to dismiss the indictment in *Hillery* was timely-

filed. As the Supreme Court stated in *Davis*, "The presumption of prejudice which supports the existence of the right [to a constitutionally-composed grand jury] is not inconsistent with a holding that actual prejudice must be shown in order to obtain relief from a statutorily provided waiver for failure to assert it in a timely manner." *Davis*, 411 U.S. at 245. *Davis* thus strongly suggests that relief from a Rule 12(b)(2) waiver is indicated only upon the defendant's showing actual prejudice.

The appellants have made no showing of actual prejudice. They point to three isolated remarks made in the course of two years of hearings — hardly enough to make it likely that, but for the remarks, the grand jury would not have indicted them on the same counts.

Because we find that the appellants have shown neither cause for the untimeliness of their motion, nor actual prejudice from its denial, we conclude that the district court did not abuse its discretion in refusing to relieve them from their waiver of the right to challenge their indictment. We therefore do not reach the merits of the appellants' constitutional claim.

We pause, however, to make clear that, despite our determination that the appellants have failed to show actual prejudice, we in no way condone the racial bias revealed in the comments made during the grand jury proceedings. We are troubled not only by the grand jurors' remarks, but more so by the failure of the AUSAs who were present to admonish the speakers and to make clear that any biases that they harbor must play no role in the matter at hand. Such official complacency, perhaps even opportunism, when racial bias infiltrates the criminal justice system, is not tolerable. While the appellants appear not to have been victimized by it, the public suffers whenever the appearance of racial bias goes uncorrected in the courthouse.

II. The Wire Fraud and ITPOF Instructions

The appellants contend that their wire fraud and ITPOF convictions must be overturned because the dis-

trict court's instructions allowed the jury to convict them for defrauding the Government of "intangible rights," and without finding that the Government was defrauded of money or property, contrary to the Supreme Court's teaching in *McNally v. United States*, 483 U.S. 350 (1987). We reject this claim because we find that, as a whole, the indictment, the evidence, and the jury instructions leave no doubt that the defendants were convicted upon the basis of a proper legal theory. In light of this conclusion, we need not and do not decide whether *McNally* applies to an ITPOF offense. (We note that *McNally* has been overruled by legislation. In November 1988, after the events giving rise to the appellants' convictions, the Congress amended the wire fraud statute to provide that "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346.)

The wire fraud and ITPOF counts of the indictment charged Steven Madeoy and Michael Friedman with devising

> a scheme and artifice to defraud the FHA and the VA of their lawful right to conduct their business and affairs free from deceit, fraud, misrepresentation, and theft *and* to defraud and obtain money and property from the FHA by means of false and fraudulent pretenses, representations, and promises which defendants well knew were false when made .... (Emphasis added.)

The district court instructed the jury regarding these counts:

> With respect to the first element, the Government must prove beyond a reasonable doubt the existence of a scheme or artifice to defraud, with the objective *either* of defrauding the FHA or the VA of their lawful right to conduct their business and affairs free from deceit, fraud, or misrepresentation, *or* of obtaining money and property from the FHA by means of false and fraudulent representations and promises

> which the defendant knew to be false. (Emphases added.)

And:

> In order to establish a scheme to defraud, the Government is not required to establish that a defendant himself originated the scheme. Nor is it necessary that a defendant realized any gain from the scheme nor that the intended victim suffered any loss as long as you find the existence of a scheme to defraud.

The wire fraud statute does not prohibit a person from participating in a scheme that is aimed solely at defrauding "the citizens and government . . . of certain 'intangible rights,' such as the right to have the [Government's] affairs conducted honestly." *McNally*, 483 U.S. at 352 (interpreting mail fraud statute); *see Carpenter v. United States*, 484 U.S. 19, 25-28 (1987) (extending *McNally* to wire fraud statute). The statute does, however, protect intangible property, as well as the right to decide how to use that property — even if a defendant's actions do not cause the property owner any monetary loss. *Id.*

We reject the appellants' contention that the indictment did not charge a scheme or artifice to defraud a victim of property. An FHA insurance commitment, by which the Government promises to pay the lender if the borrower defaults on the loan, is a "property interest," not an "intangible right" under *McNally* and *Carpenter*, because it involves the Government's "control over how its money [is] spent." *McNally*, 483 U.S. at 360. Moreover, the indictment alleged that the appellants' scheme resulted in the Government's committing itself to pay back certain loans, which it would not otherwise have agreed to do, thereby causing it to lose money; the indictment also alleged that the appellants' object was to reap financial gain from the scheme. The indictment therefore alleged a scheme for which the jury could properly convict them of wire fraud and ITPOF.

Our decision does not conflict with those of courts that have held that a government's right to issue a license is

not its property. *See United States v. Kato*, 878 F.2d 267, 268-69 (9th Cir. 1989) (FAA's right to issue a private pilot license); *United States v. Dadanian*, 856 F.2d 1391, 1392 (9th Cir. 1988) (state's right to issue gambling license); *United States v. Murphy*, 836 F.2d 248, 253-54 (6th Cir. 1988) (state's right to issue bingo license). Under those decisions, wrongful issuance of a license infringes an intangible interest in responsible government, and thus conviction for bringing about such issuance is impermissible under *McNally*. In contrast, the FHA's commitment to guarantee a loan is a significant liability to the Government and the commitments obtained by the appellants have, in fact, cost the Government money.

We reject also the appellants' claim that the jury instruction on the wire fraud and ITPOF counts requires reversal of their convictions. The appellants did not object to the instructions at trial, and they are consequently barred from challenging them here except for "plain errors or defects affecting substantial rights," under Rule 52(b). *See United States v. Debango*, 780 F.2d 81, 84 (D.C. Cir. 1986). In this context, they would have to show either that an error in the charge was so substantial that, despite all of the instructions, arguments, and evidence properly before the jury, "it affects the very integrity of the trial process," *United States v. Blackwell*, 694 F.2d 1325, 1341 (D.C. Cir. 1982), or "indicates that a serious injustice was done," *United States v. Baker*, 693 F.2d 183, 187 (D.C. Cir. 1982).

We may assume that the disjunctive in the trial court's instruction to the jury was incorrect in light of *McNally*, because it suggested that the jury could still convict even if it concluded that the defendants sought only to defraud the Government of its "lawful right to conduct [its] business and affairs free from deceit, fraud, or misrepresentation." This does not, however, amount to "plain error"; considered together, the jury instructions, the indictment, and the evidence compel the conclusion that the appellants were not convicted upon the basis of an improper legal theory.

The instructions as a whole fairly informed the jury that, in order to convict, it had to find more than a scheme to defraud the FHA of the right to conduct its business free from deceit. For example, immediately following the erroneous instruction, the court explained that "[a] scheme or artifice includes any plan or course of action to deceive others and to obtain money or property from persons so deceived by false and fraudulent pretenses, representations or promises." The court also told the jury that the alleged scheme related to the issuance of Certificates of Reasonable Value, which were used by the Government to decide whether and for how much to guarantee the loans for the 23 properties, and that in order to find the intent needed to convict, it had to conclude that the appellants "act[ed] knowingly and with the specific intent to deceive for the purpose of either causing some financial loss to another or bringing about a financial gain to [themselves]."

These instructions, along with the jury's conclusion beyond a reasonable doubt that the appellants engaged in the conspiracy with which they were charged, makes it simply impossible to imagine how the jury could have concluded that the scheme was not directed at defrauding the Government of a property interest. Thus, *United States v. Slay*, 858 F.2d 1310, 1314-17 (8th Cir. 1988), and *United States v. Ochs*, 842 F.2d 515, 521-24 (1st Cir. 1988), upon which the appellants rely, are not on point; in those cases the defendants could have committed all of the acts alleged and yet not have defrauded anyone of property. The only possible theory upon which the jury could have returned the guilty verdicts in this case is that the appellants participated in a scheme fraudulently to obtain FHA-insured loans, to their financial benefit or the Government's financial loss. Inasmuch as this theory involves fraudulently obtaining a "property interest" under *McNally*, we conclude that the erroneous instruction did not constitute plain error.

Contrary to the appellants' separate assertion, the district court was not required to instruct the jury that it

must find that the Government actually lost any money as a result of the appellants' scheme. In *Carpenter*, a newspaper lost the exclusive ability to decide how to use its confidential information; that was sufficient, although no financial loss was involved, to satisfy the property requirement. 484 U.S. at 27-28. There is no logical way to interpret the guilty verdicts here other than indicating that the jury concluded that the Government lost the ability to identify and avoid unworthy loan guarantee applications — something at least as substantial as the property in *Carpenter* — and of course it also lost money once the borrowers started defaulting.

Because we conclude that the Government properly alleged violations of the wire fraud and ITPOF statutes, and that the district court's instructions did not constitute plain error, we affirm the convictions on those counts.

III. "Public Official" Under the Bribery Statute

The bribery statute defines a "public official" as an

> officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof ..., in any official function, under or by authority of any such department, agency, or branch of Government.

18 U.S.C. § 201(a)(1). The appellants challenge their bribery convictions on the ground that the court improperly instructed the jury, as a matter of law, that a VA fee appraiser is a "public official," thus denying them their right to have the jury resolve every question of fact beyond a reasonable doubt. They also argue that, pursuant to the rule of lenity, we should interpret the assertedly ambiguous language of the statute to mean that a VA fee appraiser is not a public official. We agree with the district court, however, that a VA fee appraiser is a public official under the bribery statute, as a matter of law.

A. *Fact or Law*

In *Dixson v. United States*, 465 U.S. 482, 484 (1984), the Supreme Court held that, for purposes of the federal brib-

ery statute, the "officers of a private, nonprofit corporation administering and expending federal community development block grants are 'public officials.' " The appellants assert that, because the district court in *Dixson* had submitted this issue to the jury, it must be a question of fact and not of law.

Nothing in the Supreme Court's decision in *Dixson* remotely supports this reasoning. The Court did not address the procedure used by the district court, and it never referred to the jury's determination or suggested that it was reviewing the "evidence" for the proposition that the defendants were public officials. On the contrary, the Court reached its conclusion through an exercise in statutory interpretation, which conclusively shows that this is not a question for the jury. For example, it considered the nature of the defendants' positions in relation to Congress's intent, as evidenced by the legislative history of the federal bribery statute. *Id.* at 496-98. Therefore, we hold that whether an individual is a public official within the meaning of the statute is a question of law, and as such, a matter for judicial resolution, *see Caldwell v. United States,* 218 F.2d 370, 372 (D.C. Cir. 1954).

B. *Fee Appraisers as Public Officials*

In *Dixson* the Supreme Court interpreted the term "public official" to mean a person who "occupies a position of public trust with official federal responsibilities." 465 U.S. at 496. The Court made clear, however, that "employment by the United States or some other similarly formal contractual or agency bond is not a prerequisite" to an individual's being a public official. *Id.* at 498.

A VA fee appraiser falls within both the plain language, and the Supreme Court's interpretation, of the bribery statute. In the Court's terms, he has "official federal responsibilities": it is upon his recommendation, subject to minimal review, that the Government guarantees a loan. And his is a "position of public trust": a fee appraiser must certify that he knows the applicable regulations and must promise not to accept any assignment

for which he has a conflict of interest or to take any payment other than the appraiser's fee set by the Government. Jakey Madeoy, as a VA fee appraiser, was therefore a "person acting for or on behalf of [an] agency . . . in [an] official function, under or by authority of any such . . . agency," *i.e.*, a "public official." 18 U.S.C. § 201(a)(1).

The regulation to which the appellants refer us, which says that a fee appraiser is not an agent of the Government, 38 C.F.R. § 36.4301, has no bearing upon our decision; no one is trying to attribute to the Government an act of Jakey Madeoy as its agent. In any event, the Supreme Court's conclusion that a person does not have to be in a contractual or agency relationship with the Government in order to be a public official, *Dixson* 465 U.S. at 498, makes the regulation irrelevant to our interpretation of the bribery statute.

Finally, the decision that we reach today does not implicate the rule of lenity. The appellants have presented no reason, and we see none, why the statute is any more ambiguous with respect to a VA fee appraiser than with respect to the corporate officers in *Dixson*, where the Supreme Court expressly found that because Congress's intent was sufficiently clear, there was "no need to resort to the rule of lenity." *Id.* at 500 n.19. Accordingly, we conclude that the statute brings a VA fee appraiser within the definition of "public official" clearly enough that the rule of lenity does not apply.

IV. The Forfeiture Verdicts

The trial court charged the jury:

> If, and only if, you should find any one or more of the defendants guilty of RICO, should you [sic] list on the verdict form, in the space provided, the numbers of all the racketeering acts that you have unanimously agreed that particular defendant committed in reaching the verdict. You are not required to consider all of the racketeering acts but you may consider more than two and, if you wish, all of them.

The jury listed on the verdict form racketeering acts relating to only 11 of the 23 properties. The appellants therefore asked the court to instruct the jury that it could order forfeiture of the proceeds relating only to those 11 properties. The court refused, and the jury's special verdict required the appellants to forfeit amounts equal to the proceeds that the appellants acknowledged deriving from all 23 properties.

The appellants claim that their forfeitures should be reduced to reflect only the proceeds from the 11 properties that the jury identified on the verdict form. Contrary to the appellants' assertion, however, the scope of their RICO enterprise is not necessarily limited to the 11 properties that the jury specifically indicated in its substantive RICO verdict. The district court correctly instructed the jury that it could convict the appellants under RICO without considering whether they committed every predicate act. The jury did undoubtedly conclude, however, that the appellants committed racketeering acts relating to all 23 properties; this is the only inference we can draw from its reaching a guilty verdict on at least one substantive count relating to each property and in light of the district court's instruction. We therefore uphold the decision to order forfeiture of the proceeds from all of the properties.

We also reject Friedman's separate challenge to the verdict insofar as it requires him to forfeit some of the proceeds from the sale of a property known as the "Monroe Street Joint Venture." The only connection between the Monroe Street property and this case is that Friedman made a down payment on that property with two $5,000 checks drawn on an escrow account in which, from time to time, he deposited illicit proceeds from his racketeering activities; it was not one of the 23 properties acquired as part of the defendants' illegal scheme. The Government nevertheless sought forfeiture of all of the assets derived from proceeds of the sale of the Monroe Street property on the grounds that they constitute an "interest ... acquired or maintained in violation of [RICO]," 18 U.S.C. § 1963(a)(1), and that they are

"property constituting, or derived from, any proceeds ... obtained, directly or indirectly, from racketeering activity," *id.* § 1963(a)(3). The jury's verdict required the forfeiture of some, but not all, of the identified assets meeting one of these statutory criteria.

Friedman attacks the forfeiture verdict on two grounds, both of which go, at bottom, to the sufficiency of the evidence. First, he asserts that the $10,000 that he invested in the Monroe Street property could not have been the proceeds of his racketeering activity because, at the time the checks were drawn, the escrow account had a negative balance. The apparent lack of funds in the account at the moments that the checks were written is not dispositive, however. There was evidence that Friedman deposited illicit proceeds of his racketeering activities into the account six days after the first check was written, and before it cleared the bank. The jury could rationally conclude, therefore, that Friedman used the illicit proceeds that he deposited into the escrow account to cover the two $5,000 checks, and therefore that Friedman used racketeering proceeds to acquire the Monroe Street property.

Friedman's second argument is that the jury had no legal basis for "bifurcating" the assets derived from the Monroe Street property, *i.e.*, for ordering forfeiture of only some of those assets. We note first that, since Friedman used RICO proceeds to pay for only part of the Monroe Street property, it is not irrational for the jury to conclude that only part of the funds derived from the sale of that property trace to the illicit source of the purchase money. In any event, it is well-settled that a court should not upset a jury's verdict merely because it may be inconsistent. *United States v. Powell*, 469 U.S. 57 (1984). We see no reason why that rule should not apply as well in the context of a verdict of forfeiture; nor have other courts, *see, e.g., United States v. Williams*, 809 F.2d 1072, 1097 (5th Cir. 1987).

V. Conclusion

We have considered the other issues raised by the appellants, and we conclude that none requires discussion.

The appellants' convictions and sentences are therefore in all respects

Affirmed.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)
	) Criminal No. 86-0377
v.	)
	) FILED
STEVEN F. MADEOY	) JUL 17 1987
JAKEY MADEOY	) Clerk, U.S. MICHAEL
J. FRIEDMAN	) District Court
	District of Columbia

MEMORANDUM ORDER

Steven F. Madeoy, Jakey Madeoy, and Michael J. Friedman were convicted after a forty-day jury trial of a total of 174 counts of conspiracy, Racketeer Influenced and Corrupt Organizations Act (RICO), bribery, false statements, wire fraud, and interstate transportation of property obtained by fraud.[1] Pending before the Court are a number of post-trial motions.

I

Grand Jury

The defendants have moved pursuant to

[1]Steven Madeoy was convicted of 81 counts, Jakey Madeoy of 35 counts, and Michael J. Friedman of 58 counts.

Rule 12(b), Fed. R. Crim. P., for a dismissal of the indictment, or for a voir dire of the grand jury, on the basis that the grand jury was motivated by racial prejudice. It appears from the grand jury transcript that one member of that body stated in the course of the proceedings, commenting upon evidence that two white co-defendants[2] of these defendants had used (presumably black) members of the community to bring in primarily black prospective purchasers of the real estate in question, but that the money "as always" ended up in "white peoples' pocket." Another grand juror stated that a black purchaser of the properties in question should have inspected these properties prior to purchase because "You know the white man takes you any damn time he can and you don't look to see?" Notwithstanding these remarks, there is no

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[2]These two individuals were not tried with these defendants but pleaded guilty. The three defendants subscribing to the motion are also white.

basis for the relief defendants seek, for several reasons.

First. Rule 12(b)(2) requires that unless objections based on defects in the indictment are raised by motion made prior to trial, they are deemed waived. Francis v. Henderson, 425 U.S. 536 (1976). While this requirement may be dispensed with for "cause shown," actual prejudice is normally required in that event, Davis v. United States, 411 U.S. 233, 245 (1973) -- something defendants are clearly unable to do here.

The requirement of a pretrial motion is not a mere wooden command without substantial basis in reason or policy. As the Supreme Court said in Davis, supra, if the time limits of the Rule are followed,

> inquiry into an alleged defect may be concluded and, if necessary, cured before the court, the witnesses, and the parties have gone to the burden and expense of a trial. If defendants were allowed to flout its time limitations, on the

> other hand, there would be little incentive to comply with its terms when a successful attack might simply result in a new indictment prior to trial.

The motion in this case was not filed until almost a week after a trial began, entirely out of compliance with the Rule and after jeopardy had attached. To be sure, counsel for one of the defendants made oral reference[3] to the grand jury remarks on the first day of trial, just before the voir dire was about to begin. But that reference was not framed in terms of an attack on the grand jury or the indictment but rather in terms of a proposal for voir dire questions to the petit jury. Thus, the Court had neither a written nor an oral challenge to the indictment before it at that time.[4]

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[3]No motion was presented at that time, either orally or in writing.

[4]Responsive to defendants' request, the Court did immediately voir dire the petit jury panel with regard to racial bias, with negative results. Defendants do not claim

Moreover, counsel's reference at that time, in addition to not complying with the letter of the Rule, also contravened its spirit since an inquiry at that late juncture would have unnecessarily caused a substantial disruption.[5] Although defendants imply that they lacked an earlier opportunity to raise the issue, the fact is that the government turned over the grand jury transcript to them at least ten days prior to the trial -- ample time within which to raise the issue properly.

Second. As noted above, the petit jury was subjected to a voir dire with regard to racial bias and none was found. If there was racial prejudice in the grand jury room its

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that any racial problem existed with respect to the petit jury.

[5]Judging from their present papers, the defendants would have had the Court at that time conduct a voir dire of the grand jurors who presumably had by then dispersed. Accordingly, the trial would have had to be postponed although all the government's many witnesses were present or on immediate call as were a substantial number of members of the jury panel for the month in connection with the jury selection that was about to begin.

effect was overcome when the presumably unbiased petit jury unanimously returned the verdict against the defendants that it did.

Third. Defendants do not rely -- they cannot rely -- on Rule 6(b), Fed. R. Crim. P., which permits grand jury challenges only where the grand jury was not selected or drawn in accordance with the law or when an individual grand juror was not legally qualified. Accordingly, defendants base their claim on the Due Process Clause of the Fifth Amendment. The Court does not doubt that due process protects a criminal defendant from an indictment that is plainly the product of racial prejudice.[6] But that is not this case. Two jurors made remarks about co-defendants of these movants in the course of a long, drawn-out grand jury investigation, indicating that money from the transactions in question ended

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[6]But see Beck v. United States, 369 U.S. 541 (1962); Estes v. United States, 335 F.2d 609, 613 (5th Cir.), reh'g denied, 353 F.2d 283 (1966); United States v. Knowles, 147 F.Supp. 19 (D.D.C. 1957).

up in the pockets of white individuals.[7] Although categorization of individuals based on their race or color is certainly to be condemned, in the context of facts here the references do not demonstrate such bias by the grand jury[8] as a body that, especially in view of the belated defense effort to raise the issue, either a dismissal of the indictment or a voir dire of last year's grand jury is required.

* * *

[Remainder of opinion not reproduced.]

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[7]That assessment, insofar as the evidence shows, was not wide off the mark.

[8]According to 4 Barron, Federal Practice and Procedure §1892 at 44, Congress expected grand juries to be "scrupulously fair, but not necessarily uninformed or impartial."

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-3085 SEPTEMBER TERM, 1989
D.C. Crim. No. 86-0377-01

United States of America

v.

Steven F. Madeoy, et al.,

Appellants

United States Court of Appeals For The District of Columbia Circuit
Filed Aug 10 1990
Constance L. Dupre, Clerk

and Consolidated Case Nos: 87-3086, 87-3088

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: Edwards, Williams and D.H. Ginsburg, Circuit Judges

J U D G M E N T

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the judgments of the District Court appealed from in these causes are hereby affirmed, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
FOR THE COURT:

CONSTANCE L. DUPRE, CLERK

Date: August 10, 1990
Opinion for the Court filed by Circuit Judge D.H. Ginsburg

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-3085 SEPTEMBER TERM, 1990
CR 86-00377-01
86-00377-02
86-00377-03

United States of America

v.

Steven F. Madeoy,

Appellant

United States Court of Appeals For The District of Columbia Circuit
Filed Oct 16 1990
Constance L. Dupre
Clerk

and Consolidated Case Nos: 87-3086, 87-3088

BEFORE: Edwards, Williams and D.H. Ginsburg, Circuit Judges

O R D E R

Upon consideration of appellants' petition for rehearing, it is

ORDERED, by the Court, that the petitions are denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE,
CLERK

BY:
Linda E. Jones
Deputy Clerk